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May 26, 1999

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Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

RE: CC Docket No. 96-98; 95-185, FCC 99-70
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers

Dear Ms. Salas:

Pursuant to the Federal Communications Commission's Public Notice in the above referenced proceeding, enclosed for filing are an original and twelve copies of the Comments of the Washington Utilities and Transportation Commission on the Second Further Notice of Proposed Rulemaking. We are also filing electronically, and an additional copy is being sent to Janice M. Myles in the Common Carrier Bureau, and with International Transcription Services, Inc.

Please contact Tom Wilson at (360)-664-1293, *tomw@wutc.wa.gov,* if you have any questions about this filing.

Sincerely,

JEFFREY D. GOLTZ
Senior Assistant Attorney General

JDG:kll
Enclosure
cc: Janice M. Myles
International Transcription Services, Inc.

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Before the
Federal Communications Commission
Washington, D.C. 20554

In Matter of	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

Comments of the Washington Utilities & Transportation Commission On The Second Further Notice of Proposed Rulemaking

The Washington Utilities and Transportation Commission ("WUTC") hereby files comments concerning the Second Further Notice Of Proposed Rulemaking ("Second Further NPRM") released by the Federal Communications Commission ("Commission") in the above-captioned proceeding on April 16, 1999.

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SUMMARY

The WUTC welcomes this opportunity to comment on the issue of defining "unbundled network elements" ("UNEs") for competitive local interconnection under Section 251 of the Telecommunications Act of 1996. As Congress has recognized, states require significant flexibility to implement Section 251, because states are closest to the local issues involved. However, effectively promoting competition and universal service also requires strong and clear federal guidelines. We limit our comments at this time to the following points:

1. **State authority to add or subtract elements from the Commission list** Though the Communications Act of 1934, as amended by the Federal Telecommunications Act of 1996, 47 U.S.C. §151 et seq. (Act), requires that the Commission promulgate a list of elements that must be made available by incumbent local exchange carriers (ILECs) to other telecommunications carriers, states have the legal authority to add additional elements. The Commission also may, and should, adopt criteria for granting waivers of the Commission-required elements.

2. **Role of "essential facilities doctrine" in developing list of elements which should be made available** The Commission should *not* adopt the essential facilities doctrine as the controlling principle for determining which elements should be made available.

3. **Application of the "necessary" and "impair" standards in section (d)(2)** The Commission should apply the statutory criteria primarily to elements that create "bottleneck"

conditions, with the result that the prior list of seven elements should remain in the final Commission list.

4. **Possible "subdivision" of elements** The Commission should consider possible subdivision of existing elements into subparts, particularly the local loop.

INTRODUCTION

Our comments reflect an underlying philosophy that this rulemaking should enable and promote competitive efficiency and reliability in the provision of basic universal service as well as the availability of advanced services, at comparable rates and quality in both urban and rural areas. It is important to achieve less interference by the quasi-judicial and administrative process and more competition in the marketplace. The rules the Commission ultimately adopts should not constrain consumers and other stakeholders with more process.

DISCUSSION

I. Legal authority under which states may add or subtract elements to or from an FCC list.

The Second Further NPRM seeks comment on the Commission's "tentative conclusion" that it should "continue to identify a minimum set of network elements that must be unbundled on a nationwide basis," ¶14, and whether the Commission could delegate to states the responsibility for removing elements from the list. ¶38. If delegation is an option, the Second Further NPRM requests comments on what procedure should be used for delegation. Id.

We comment first on whether a national "list" is required under the Act. We conclude one is required. Second, we comment on whether, and under what authority, a state commission may add elements to that list. We conclude that a state commission may add elements. Finally,

we suggest processes which would enable, under specified conditions, state commissions to in effect limit obligations of ILECs to provide certain elements.

A. A Federal List of Elements That Must Be Made Available Is Required Under the Act

Subsection 251(d)(2) of the Act states that

> "[i]n determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether --
>
> (A) access to such network elements as are proprietary in nature is necessary; and
>
> (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."

This section, by its plain terms, assigns to the Commission the role of "determining" the UNEs that must be made available. Subparagraph (1) of that subsection indicates that such determination must be made by rule.

The legislative history of the Act supports this interpretation. Comparing the language of section 251(d)(2) with the language contained in S. 652 reveals an intent to require a federal list. S. 652 would have required an ILEC to provide access to its "facilities and information" and would have required the FCC to establish "standards for determining" which facilities and information would have to be made available.[1] Presumably, the specific facilities and

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[1]Section 251(i)(1) of the S.652 stated:

> The Commission shall promulgate rules to implement the requirements of this section within 6 months after the date of enactment of the Telecommunications Act of 1995. In establishing the standards for determining what facilities and information are necessary for purposes of subsection (b)(2) [relating to minimum standards for interconnection agreements], the Commission shall consider, at a minimum, whether --

information (the Senate bill's analog to elements) were to be determined pursuant to Commission criteria in specific cases. However, the final Act was more directive to the Commission. Instead of requiring the Commission to establish "standards for determining" the elements, the final bill required the Commission to "determine" the elements themselves.

In some ways, we believe that the approach of the Senate bill described above, by which the Commission would simply establish criteria for determining which elements must be made available, makes more sense than the list approach adopted in the final Act. It is less prescriptive and avoids problems generally associated with a "one-size fits all" approach. It properly recognizes that state commissions, implementing the provisions of federal act in conjunction with state laws and policies, are best able to determine, within stated criteria, what network elements must be made available.[2] However, given that Congress has determined that there must be a federal list, the question remains to what extent the Commission must prescribe a set, inflexible list or whether it, or a state commission, may act to add or subtract items from that list in given circumstances.

(A) access to such facilities and information that are proprietary in nature is necessary; and

(B) the failure to provide access to such facilities and information would impair the ability of the telecommunications carrier seeking interconnection to provide the services that it seeks to offer.

[2]The legislative history of the Act is replete with references to Congress's preference that state "PUCs are the best entities to judge whether a given market within their State can support competition." E.g., 142 Cong. Rec. S709 (daily ed. Feb. 1, 1996) (remarks of Sen. Hatch).

B. State Commissions, Under State Law, May Add Elements to the List of Required Network Elements Which Must Be Made Available

In our view, a state commission clearly may add elements to the list, and, so long as such additional elements are "consistent" with the requirements of section 251, the Commission may not limit such state authority. Section 251(d)(3) of the Act states:

> In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that --
>
> (A) establishes access and interconnection obligations of local exchange carriers;
>
> (B) is consistent with the requirements of this section; and
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

Access to unbundled network elements is an interconnection "obligation."[3] Therefore, section 251(d)(3) allows state commissions to add other elements to the list, by regulation, order, or otherwise. That section limits the preemptive power of the Commission by stating that it shall "not preclude" state commission action if it is "consistent with the requirements of this section."

Whether a given state commission obligation is valid would be a question that could be resolved in any court challenge to a state arbitration decision under 47 U.S.C. §252(e)(6).[4]

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[3]The heading of section 251(c) is "Additional Obligations of Incumbent Local Exchange Carriers." Among those obligations are access to network elements. 47 U.S.C. § 251(c)(3).

[4]The United States district courts would have pendent jurisdiction to determine whether as a matter of state law a particular commission has state law authority to impose additional interconnection obligations.

C. Under an Appropriate Commission Rule, a State Commission Should Be Empowered to Apply Fewer than All the Elements on the Federal List

Application of the statutory standards for determining which elements must be made available will not establish a static list. Which elements are "necessary" and the absence of which elements will "impair" a telecommunications carrier's ability to provide service may vary as times and conditions change. That reality requires the Commission to read into the statutory directive to develop a list with as much flexibility as possible to allow state commissions to apply the list as local conditions warrant.

In the Second NPRM, the Commission sought comment on whether the Commission could "delegate" the authority to subtract elements from the federal list. Second NPRM ¶38. The question of whether a state commission may subtract elements from the list is conceptually different from the question of whether a state commission may add elements. The latter is authorized as a function of section 251(d)(3), which recognizes state commission authority to add new obligations. Subtracting elements from the list could be viewed as eliminating obligations rather than adding them.

However, while the Commission is obligated to "determine" which elements must be made available, and it must adopt rules "to implement the requirements of [section 251]," the Commission is not without some flexibility in making such determinations. We see at least two means by which, in effect, the Commission could implement something analogous to state commission authority to "subtract" elements from the federal list.

First, the Commission could adopt criteria under which it would waive the necessity of making certain elements available. Under the Commission's general waiver rule in 47 C.F.R.

§1.3, the Commission may waive the application of any rule "if good cause therefor is shown." The Commission could adopt criteria under which it would grant such requests by a state commission. If the Commission chooses this option, it should make those criteria relatively deferential to the state commissions, which under the Act are in the best position to guide the initiation of competition within their respective jurisdictions.

Second, in promulgating the list, the FCC could establish conditions under which state commissions need not require the provision of selected elements. In effect, the Commission could list the elements to be made available and then describe conditions under which failure to provide certain elements would not "impair" the ability of a telecommunications carrier to provide service in competition with the ILEC. For example, it may be that, at some point, local switching capability is so widely available that a competing carrier need not obtain that element from the ILEC to provide service. In such a case, perhaps for a given geographic area, failure to provide that service would not "impair" the competitor's provision of service. Therefore, in arbitrating a given interconnection dispute, a state commission, under Commission-established criteria, would not, under federal law, have to require the provision of this element. Under this process, there would be no appeal to the Commission of a state decision, any more than there could be an appeal of a state decision to exercise its authority under section 252(d)(3). Any challenge would be in the challenge to the arbitrated agreement in federal court.[5]

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[5]47 U.S.C. §252(e)(6). Of course, the Commission could participate as an amicus curiae in those federal court proceedings, as it has in cases involving challenges to WUTC arbitrated interconnection agreements. E.g., Brief for the Federal Communications Comm'n as Amicus Curaie, US West Communications, Inc. v. MFS Intelenet, Inc., No. 98-35146 (9th Cir.).

Specifying generic criteria for the self-executing inapplicability of various listed elements would be a complex and time-consuming task. Therefore, given the need to minimize further delay, we urge the Commission to defer this task and rely, for the time being, on a general waiver process for states, on a case-by-case basis, to subtract various elements from the federal list in certain prescribed circumstances. Further refinement of the Commission's rule on this issue should await some further development of competitive alternatives and a "Third Further NPRM."

II. The role of the "essential facilities doctrine" in determining which network elements an incumbent local exchange carrier ("ILEC") must provide

The Second Further NPRM, ¶¶22-23, seeks comment on whether the "essential facilities doctrine" in antitrust jurisprudence should be applied in the determination of which network elements an incumbent LEC must provide on an unbundled basis pursuant to sections 251(c)(3) and 252(d)(2) of the Act. The incumbent LECs argued to the United States Supreme Court that section 251(d)(2) codifies "something akin" to that doctrine. AT&T Corp. v. Iowa Utilities Bd., 119 S.Ct. 721, 734 (1999). The Supreme Court declined to rule on that argument, holding only that section 251(d)(2) requires some limiting standard.

We believe that the essential facilities doctrine, as it has commonly been applied in the telecommunications field, is *not* the legally mandated standard under the Act. Indeed, given the prominence of that standard in some pre-Act case law and the total lack of reference to the essential facilities doctrine in the legislative history of the Act, a more logical conclusion is that Congress did not intend that standard to be applied by the Commission or the state commissions in implementing the Act.

Perhaps the leading case applying the essential facilities doctrine to the telecommunications industry is MCI Communications Corp. v. AT&T, 708 F.2d 1081(7th Cir.), cert. denied, 464 U.S. 891 (1983), in which the Seventh Circuit listed the four prerequisites to the application of the doctrine:

> "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

Id. at 1132-33.[6]

Congress in determining which standard to impose on the Commission in selecting elements that must be made available certainly had this standard before it as an option. But there is nothing in either the text of the Act or in its legislative history which suggests that Congress intended the "essential facilities" doctrine to be the controlling standard.[7] Indeed, the use of the terms "necessary" and "impair" in the Act, and the absence of those specific terms in general

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[6]US West has cited this case to bolster an related and analogous argument in the case of US West Communications, Inc. v. MFS Intelenet, Inc., No. 98-35146 (9th Cir., filed ____), that the essential facilities doctrine "is informative in determining whether the Act requires incumbent LECs to resell deregulated services." Id., Brief of Appellant at 20. However, in that context, the Commission stated:

> Contrary to US West's suggestion . . ., the Act neither limits the telecommunications services that an incumbent must offer for resale to "essential facilities," nor exempts deregulated or unregulated telecommunications services from this obligation.

Br. of Federal Communications Commission as Amicus Curiae, at 20, US West Communications v. MFS Intelenet, No. 98-35146 (9th Cir.) (_____).

[7]Indeed, the United States Supreme Court has not adopted the essential facilities doctrine as part of its antitrust jurisprudence. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

discussions of the doctrine, indicate that the essential facilities doctrine was not necessarily the intended standard.[8] Its application could unduly limit the tools given by the Act to the Commission and to state commissions to implement competition in the local exchange.

III. Necessary" and "impair" standards

In determining which elements should be made available, the Commission should apply the terms "necessary" and "impair" at a minimum to determine which unbundled network elements create "bottleneck" conditions and hence create barriers to entry in an incumbent's market.

The Commission has previously established a list of seven unbundled elements: (1) Local loops; (2) Network interface devices; (3) local switching; (4) interoffice transmission; (5) signaling networks and call-related databases; (6) operations support systems; and (7) operator services and directory assistance.

The WUTC believes that both 1) local loops and 6) operator support systems are absolutely essential to a CLEC's ability to provide local service. The WUTC also believes that at this time all of the other elements mentioned are "necessary" and that their unavailability would "impair" a competitor's ability to provide service within Washington state. Therefore we recommend that this list remain intact, at least for the time being.

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[8]The policy reason behind the rejection of the essential facilities doctrine as the governing standard is that it may unduly restrict the availability of elements to competitors. For example, should there be burgeoning facilities-based competition in an area (e.g., with a cable company), it may be impossible to say that the "essential facility" is in the hands of a monopoly. Therefore, to apply the essential facilities doctrine could limit the available of elements in such a situation.

We believe that on a long-term basis, many of these items may become available from other providers. When that happens, it may be appropriate to remove certain unbundled network elements from the list required to be made available by the ILEC, or to permit states not to require their availability pursuant to appropriate conditions.

Although some elements may become available in certain areas, it is highly unlikely these elements will be available ubiquitously across an entire state. It is even less likely these elements will have full availability nationwide, as an alternative to an incumbent's network elements. Thus, as suggested in the preceding section, it may also be advisable to permit consideration of unbundling requirements and waivers in the context of relevant geographic market zones as well. For example, in major U.S. cities such as New York City, or portions of New York City such as Manhattan, removing the ILEC's obligation to provide local switching as an unbundled network element may make some sense due to the possibility that enough competitive providers may exist as to render the requirement no longer necessary. However, even in the foreseeable future, such a condition seems unlikely in second-tier U.S. cities like Seattle. If the day does come where there exists effective competition for the provision of unbundled local switching in the Seattle area, perhaps the obligation of the ILEC could be removed in the geographic area of the relevant Seattle market. However, it would most likely remain the case that continuing the obligation for the remainder of the ILEC's service territory in Washington would be appropriate. Of course, the interconnection obligations of the ILEC may also be tempered by Section 251(f) of the Act relating to exceptions for rural telephone companies.

The WUTC believes that it is appropriate to allow states to determine in which locations, or exchanges, it is permissible to waive the unbundling requirement for a particular element. We also believe it may also be appropriate for the FCC to remove certain elements from its list in the future, based on availability of alternate sources. However, we do not support the suggestion of the FCC that certain elements be allowed to "sunset" by a date certain. Sunset clauses should be based solely on supportable evidence showing effective competition in the supply and availability of alternatives that do not "materially" alter a competitor's costs or service quality compared to similar elements available to an incumbent. Overall network performance should also be an important consideration. Even if the FCC has determined that a certain element should be given "sunset" status in the FCC's list, a state should not be prevented from continuing to declare certain elements as "necessary' and that their unavailability would "impair" a competitor's ability, either on a statewide or local basis.

With regard to dark fiber, states should be permitted to classify dark fiber as an unbundled network element. The WUTC has determined that dark fiber is a service, and that it should be available to CLECs as part of an interconnection arrangement. Unavailability of dark fiber as a UNE could "impair" a CLEC in cases where an incumbent has its own fiber in place.[9]

Regarding subloop unbundling, most bottleneck situations involve the "last mile" of network. Where this involves distribution (or possibly feeder, when a CLEC is provisioning a

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[9]The WUTC has required the provision f dark fiber as an element, and that requirement has been upheld. MCI Telecommunications, Inc. v. U.S. West Communications, No. C97-1508R, Order at 13 (W.D. Wash. July 21, 1998), appeal pending, Nos. 98-35819, -35820, -35822 (9th Cir.).

subdivision, business park, or high-rise, with its own distribution cable) and the other portion of the loop is owned by the CLEC, the bottleneck portion should be treated as "necessary," and be included as an element.[10]

CONCLUSION

The WUTC appreciates the opportunity to comment on the Second Further NPRM, and looks forward to working with the FCC as it moves forward with this proceeding.

DATED this 26th day of May, 1999, at Olympia, Washington.

MARILYN SHOWALTER, Chairwoman
Washington Utilities and Transportation Commission

RICHARD HEMSTAD, Commissioner
Washington Utilities and Transportation Commission

WILLIAM R. GILLIS, Commissioner
Washington Utilities and Transportation Commission

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[10]Commission rules for UNEs should require the incumbent to provide access to any line, as an unbundled network element, for the purpose of providing advanced services. This issue concerns further unbundling of network elements, as well as the FCC's First Report and Order and Further Notice of Proposed Rulemaking in the matters of deployment of wireline services offering advanced telecommunications capability, in CC Docket No. 98-147 (FCC 99-48). We intend to offer additional comment on this subject in that docket in compliance with the due-date for initial comments, June 15, 1999.